Supreme Court, U.S.
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No. 94-0181

In The

Supreme Court of the United States

October Term, 1994

SOWASHEE VENTURE,

Petitioner,

v.

EB, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Austin Development Company ("Debtor") was the lessee in a long term ground lease with Sowashee Venture ("Sowashee") as lessor. Debtor borrowed money, built a motion picture theater, and subleased the theater to R & S Theaters, Inc. ("R & S"). R & S also entered into a non-disturbance agreement with Sowashee. Several years later Debtor borrowed money from Eastover Bank for Savings ("Bank")[1] to pay the construction loan for the theater. Under express authority in the ground lease, Debtor granted Bank a deed of trust (mortgage) on its tenant leasehold interest to secure the loan. Debtor also assigned the R & S sublease to Bank as collateral for the loan.

Later Debtor filed a chapter 11 petition under the Bankruptcy Code, but failed to assume the lease within 60 days after filing. Under Bankruptcy Code § 365(d)(4), if a chapter 11 debtor-tenant does not assume a commercial lease within 60 days after filing, the lease is "deemed rejected" and the debtor "shall immediately surrender possession of such nonresidential real property to the lessor."

Primary issue: Did Debtor's failure to assume the lease extinguish Bank's mortgage on Debtor's leasehold interest and Bank's assignment of the R & S sublease?

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[1] During the appeal, Eastover Bank for Savings changed its name to EB, Inc. To avoid confusion, EB, Inc. is referred to in this response as "Bank".

QUESTIONS PRESENTED – Continued

Other issues:

1. Did Sowashee's acceptance of rent from Debtor after the 60 day assumption period waive any rights of Sowashee to seek a termination of the ground lease under § 365(d)(4)?

2. If § 365(d)(4) requires the extinguishment of Bank's mortgage, is the statute unconstitutional as a taking of property without due process of law?

3. Sowashee failed to give notice to Bank of the claimed termination of Debtor's ground lease and refused to lease to Bank on the same terms, as required by paragraph 21 of the ground lease. Should Sowashee be required to fulfill its obligations under the ground lease and enter into a lease with Bank?

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CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution reads in part as follows:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

Sowashee claims the ground lease terminated on March 4, 1991 (sixty (60) days after the filing of the Chapter 11 Petition). But Sowashee has been paid and accepted rent under the ground lease every month since the bankruptcy. In fact, Sowashee was twice paid the rent due for April, 1991.

Paragraph 21 of the ground lease (Appendix A hereto, App. 1) provides:

1. Debtor could grant a deed of trust on its tenant leasehold interest to a leasehold mortgagee, such as Bank.[2]

2. Sowashee would not modify or cancel the lease without the mortgagee's consent.

3. If the lease terminated for default, the mortgagee could lease the property from Sowashee on the same terms and conditions as the ground lease.

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[2] Sowashee admitted that Bank is a "Leasehold Mortgagee" under paragraph 21 of the Ground Lease. (Record Vol. 4, page 23, Lines 20-23).

Under this express authority, Debtor granted Bank a deed of trust on its leasehold interest in the ground lease. Debtor also assigned to Bank as collateral its sublease to R & S. Sowashee failed to give Bank notice of any default by Debtor or that Sowashee claimed the ground lease was terminated. The Bank counterclaimed to require Sowashee to enter into a new lease with Bank for the remainder of the term on the same terms as the ground lease. (R. 043-045).

REASONS FOR DENYING PETITION

In the ground lease Sowashee agreed that the Debtor could mortgage its leasehold interest, so Debtor could borrow funds to build the theater on the leasehold property. Sowashee agreed that if the lease terminated prematurely, the mortgagee could lease the premises for the remainder of the lease period on the same terms as Debtor.

Sowashee has suffered no loss because of Debtor's bankruptcy, as Sowashee has received and continues to receive all rent due it under the ground lease.

If Sowashee can cancel the Bank's mortgage on the leasehold and not lease the property to the Bank, then Sowashee gets the theater back about nineteen years early and gets $11,000.00 per month rent, rather than $1,500.00 per month rent. Thus, Sowashee wants a windfall of about $2,000,000.00 at the Bank's expense. If Sowashee had been successful, Bank would have been converted from a secured creditor to an unsecured creditor of a no-asset bankruptcy debtor.

Sowashee's petition fails to recognize that the dispute in the instant case is between Bank, as mortgagee of the Debtor's leasehold interest, and Sowashee, as Debtor's lessor. Sowashee claims a conflict between the circuits based solely on a Ninth Circuit case involving a dispute between the lessor and debtor/tenant, with no third party involved.

I. THE 1938 ACT REQUIRED ASSUMPTION WITHIN 60 DAYS.

Section 70(b)[3] of the former Bankruptcy Act was added to the statute by the Chandler Act in 1938. 52 Stat. 840, 880 (1938).

Sixteen years ago the Fifth Circuit held that a lease deemed rejected under Bankruptcy Act § 70(b) did not terminate the lease, but merely placed the trustee's obligation to perform under the lease outside the bankruptcy administration without destroying the leasehold estate. *In Re Garfinkle*, 577 F.2d 901, 904 (5th Cir. 1978). As in the present case, *Garfinkle* involved the rights of the mortgagee of a debtor-tenant's leasehold interest.

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[3] Bankruptcy Act § 70(b) provided in part as follows: The trustee shall assume or reject an executory contract, including an unexpired lease of real property, within sixty days after the adjudication or within thirty days after the qualification of the trustee, whichever is later, but the court may for cause shown extend or reduce the time. Any such contract or lease not assumed or rejected within that time shall be deemed to be rejected.

The primary issue involving the rights of third parties is not new, but was resolved under the Bankruptcy Act. When congress amends the bankruptcy law, it does not write on a "clean slate". This Court has been reluctant to accept arguments that would interpret the Bankruptcy Code to effect a major change without at least some discussion in the legislative history. *Dewsnup v. Timm*, 112 S. Ct. 773, 116 L. Ed. 903, 912 (1992).

II. NO CONFLICT EXISTS BETWEEN THE CIRCUITS.

Although conflicts exist among bankruptcy and district courts, no conflicts exist between the circuits. Sowashee's claim of conflict relies primarily on *Sea Harvest Corp. v. Riviera Land Co.*, 868 F.2d 1077 (9th Cir. 1989). That case involved a dispute solely between the lessor and the debtor-tenant. The present case involves a dispute between the lessor and the mortgagee of the debtor-tenant, where the mortgage expressly authorized the lessee to grant a lien against its leasehold interest.

The present case also involves the validity of the assignment to Bank of the R & S sublease. Because of the non-disturbance agreement between Sowashee, as Debtor's lessor, and R & S, as Debtor's subtenant, R & S's lease from Debtor continued in effect. The assignment of that sublease to Bank as collateral also continued in effect. The *Sea Harvest* case did not involve the validity of the assignment of a sublease of the debtor.

Sowashee also relies upon the Third Circuit case of *Chatlos Systems, Inc. v. Kaplan*, 147 B.R. 96 (D. Del. 1992), affirmed without opinion, 998 F.2d 1005 (3rd Cir. 1993). In

that case the debtor-tenant notified the Bankruptcy Court that it did not intend to assume the lease. The Bankruptcy Court entered an order that the lease had been rejected and ordered the debtor to surrender possession to the landlord. The dispute in that case was between the landlord and a subtenant. Because of the non-disturbance agreement between Sowashee and R & S, no such dispute exists in the present case. Sowashee recognizes R & S' right to possess the theater property.

Sowashee has not cited a single Circuit Court decision involving a dispute between the mortgagee of the debtor-tenant and the lessor.

III. EVEN IF A CONFLICT EXISTS, THE COURT SHOULD NOT REVIEW THE CASE.

Under Rule 10, Rules of the Supreme Court, this Court grants a petition for writ of certiorari "only where there are special and important reasons therefor." The petition presents no special and important reasons for the Court to review this case.

Mr. Justice Harland stated in 1959 that:

> . . . a conflict of decisions may safely be relied on as a ground for certiorari only in instances where it is clear that the conflict is one that can be effectively resolved only by prompt action of the Supreme Court alone.

Mr. Justice Harland, *Some Aspects of the Judicial Process in the Supreme Court of the United Sates*, 33 Australian L.J. 108 (1959).

Each term this Court denies many petitions for certiorari involving direct or partial conflicts between the circuits. In cases not involving a high degree of importance, the pressure of the Court's docket has caused the Court to deny certiorari. *Commissioner v. Factor*, 364 U.S. 932, 81 S. Ct. 378, 5 L. Ed. 2d 365 (1961).

Mr. Justice Brennan has stated: "There is already in place and has been ever since I joined the Court [in 1956] a policy of letting tolerable conflicts go unaddressed until more than two courts of appeals have considered a question".

Justice Brennan, *Some Thoughts on the Supreme Courts' Workload*, 66 *Judicature* 230, 233 (1983).

Such a policy was expressed by Mr. Justice Stephens when he stated:

> The existence of different rules of law in different sections of our great country is not always an intolerable evil . . . it would be better, of course, if federal law could be applied uniformly in all federal courts. But experience with conflicting interpretations of Federal Rules may help to illuminate an issue before it is finally resolved and thus may play a constructive role in the lawmaking process. The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desired result.

See *McCray v. New York*, 461 U.S. 961, 963, 103 S. Ct. 2438, 77 L. Ed. 2d 1322 (1983) (Stephens, J.).

In *Gilliard v. Mississippi*, 464 U.S. 867, 104 S. Ct. 40, 78 L. Ed. 2d 179 (1983), Mr. Justice Marshall, in his dissent,

indicated that the Court sometimes "postpone[s] consideration of the issues until more state supreme courts and federal circuits have experimented with substantive and procedural solutions to the problem".

A recent trend in the Supreme Court is to deny certiorari where justice would be better served by allowing the lower courts to define and narrow the issue in question.

IV. THE COURT CAN DECIDE THE CASE ON ANOTHER GROUND.

Upon a petition for writ of certiorari, where the Supreme Court might be able to decide the case on another ground and not address the point in conflict, a conflict may not be sufficient reason for granting review. *Sanson Hosiery Mills v. N.L.R.B.*, 344 U.S. 863, 735 S. Ct. 103, 97 L. Ed. 669 (1952); *Arlington, Inc. v. Mayer*, 339 U.S. 965, 70 S. Ct. 1000, 94 L. Ed. 1373 (1950).

As the Court stated in *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180, 184, 79 S. Ct. 710, 3 L. Ed. 2d 723 (1959):

> While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of the . . . [issue in conflict among the circuits] can await a day when the issue is posed less abstractly.

In the present case the Court could avoid decision of the primary issue by ruling that Sowashee waived its rights under § 365(d)(4) by accepting rent after the sixty

(60) day assumption period. See *Larkins v. Sills*, 377 F.2d 1, 3 (5th Cir. 1967) (involving a waiver under Bankruptcy Act § 70(b)) and *In Re: TFP Resources, Inc.*, 56 B.R. 112, 115-16 (Bankr. S.D. N.Y. 1985) (" . . . Lessor accepted rent and thereby continued to treat the lease in effect notwithstanding the deemed rejection provided by § 365(d)(4)").

The Court could also avoid deciding the bankruptcy issue by affirming the Fifth Circuit's recognition of Bank's right to enforce paragraph 21 of the ground lease. The Fifth Circuit held that Bank retained its rights against Sowashee as a third party beneficiary of the ground lease. (Petitioner's Appendix A, Page 14a). Regardless of whether the lease continues in existence, the enforcement of paragraph 21 of the ground lease would protect Bank's rights in this case.

V. IF CERTIORARI IS GRANTED, THE COURT MUST ADDRESS THE CONSTITUTIONALITY OF § 365(d)(4).

As part of its defense to Sowashee's complaint to have the Bank's deed of trust declared void, the Bank has raised the unconstitutionality of § 365(d)(4). (R. 040-041)

As a secured creditor, Bank has a constitutionally protected property right to receive the amount of its secured claim. *U.S. v. Security Industrial Bank*, 459 U.S. 70, 103 S. Ct. 407, 74 L. Ed. 2d 235 (1982); *In re Johnson*, 63 B.R. 550, 551 (Bankr. Col. 1986). Before that property right can be extinguished, Bank is entitled to due process under the Fifth Amendment to the United States Constitution. *Cardinal Chemical Company v. Morton International*, 508 U.S. ___, 113 S. Ct. 1967; 124 L. Ed. 2d 1 (1993);

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950). When a statute allows for the deprivation of a property right without due process, it is in violation of the Fifth Amendment and is unconstitutional. *Trainor v. Hernandez*, 431 U.S. 434, 97 S. Ct. 1911, 522 L. Ed. 2d 486 (1977).

Bank could not protect itself under § 365(d)(4). As noted by the Fifth Circuit, precisely how Bank was to protect itself is not explained and highly problematic. (Petition, Appendix A, p. 6a-7a) Bank did not have standing to file a motion to force Debtor to assume the lease because:

(1) § 365(d)(4) allows only the trustee (debtor-in-possession) to assume a lease;

(2) Bankruptcy Rule 6006(b) allows only a party to a lease to seek to assume or reject; and

(3) *In the Matter of James Wilson Associates*, 365 F.2d 160, 169 (7th Cir. 1992) held that a mortgagee did not have standing to enforce assumption of a lease under § 365(d)(4).

The Court avoids constitutional decisions when cases can be decided on other grounds.

VI. THE FIFTH CIRCUIT'S DECISION DOES NOT CREATE UNCERTAINTY, IMPEDE REORGANIZATIONS, OR FRUSTRATE BANKRUPTCY LEGISLATIVE HISTORY.

A. Uncertainty.

Sowashee claims that the Fifth Circuit's opinion creates uncertainty. To the contrary, the opinion creates certainty and avoids expensive, time consuming, and needless litigation. As explained by Michael T. Andrew, *Executory Contract in Bankruptcy; Understanding "Rejection,"* 59 Col. L. Rev. 845, 849 (1988):

> Far from benign, the confusion over rejection has yielded wasteful litigation, absurd results, and dramatic distortions in bankruptcy law. Understanding that rejection does not affect contract liabilities demonstrates, for example, that litigation over whether rejection will be permitted is largely a pointless exercise. That understanding also makes clear that terminating rights in or to property arising under contracts that happen to be "executory" is fundamentally contrary to general bankruptcy principles, to the history and purpose of executory contracts doctrine itself, and to common sense.

If no third party rights are involved, the debtor in possession must immediately surrender possession to Lessor. If a third party's rights are involved, then the landlord proceeds with his rights under state law in state court. State law universally grants the landlord a speedy possessory remedy.

Under the Fifth Circuit ruling, both the landlord and the third party can easily judge their legal positions. If

the third party does not timely cure any breach of the lease, the landlord simply uses the lease provisions to terminate the lease for breach. If still denied possession, the landlord uses the speedy state court remedies for possession from the third party.

B. Adverse Effects on Bankruptcy Reorganization.

The Fifth Circuit's ruling assists the debtor in a reorganization. The debtor knows that it must either assume the lease in 60 days or surrender possession to the landlord. The debtor knows that if third parties have an interest or lien against its leasehold rights, those liens or rights must be covered in the debtor's plan of reorganization.

If a debtor inadvertently allows the 60 days to run, the debtor still can protect the asset by curing any default within the time permitted by the lease and state law. Under the rule sought by Sowashee, the debtor's interest in the lease is terminated at the stroke of midnight on the sixtieth day. In that case the debtor loses forever a needed leasehold interest, and its ability to reorganize.

C. Frustration of Legislative Intent.

In enacting the 1984 shopping center amendments to the Bankruptcy Code, Congress did not consider or even discuss the rights of third parties in the lease arrangement, such as the mortgagee of the tenant's interest. See 1984 *U.S. Code Cong. and Adm. News*, 590, 598-599. Thus, there is no legislative history concerning the rights of

third party lienors in the debtor-tenant's leasehold interest. The Fifth Circuit's opinion is, therefore, not contrary to the legislative history.

D. Rejection is Termination.

The Bankruptcy Code does not define "rejection" of a lease. There is no common law definition of "rejection". Various bankruptcy courts have described the power to reject as a release, repeal, reconsideration, discharge, revocation, repudiation, alteration, voiding, cancellation, or avoidance. William E. Winfield, *Rejection of Nonresidential Leases of Real Property in Bankruptcy: What Happens to the Mortgagee's Security Interest*, 17 Pepperdine L. R. 429, 430 (1990) Thus, the Court must look to entire § 365 for meaning.

Section 365(g) provides that if the lease has not been assumed under § 365, the rejection of the unexpired lease constitutes a "breach" of the lease.

The word "termination" does not appear in § 365(d). Congress knew how to authorize a termination of executory contracts and leases. In § 365(h), (i), and (n), Congress used "termination" as one option available if the debtor has rejected a executory contract. Even under those provisions, a termination does not occur except at the third party's option.

E. Neither Avoidance Nor Forfeiture.

The Fifth Circuit Court of Appeals correctly held that § 365(d)(4) was not one of the avoidance powers granted

by the Bankruptcy Code and could not be used to extinguish the property right of the third party lienor.

CONCLUSION

EB, Inc. (formerly Eastover Bank for Savings) requests the Court to deny the Petition for Writ of Certiorari filed by Sowashee Venture.

Respectfully submitted,

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APPENDIX A

Excerpt from Ground Lease

21. Leasehold Mortgage.

(a) Lessee is hereby given the right by Lessor, without Lessor's prior consent, to mortgage all or part of the leasehold estate created by this Lease, and to refinance same, at any time and from time to time, under a leasehold mortgage (herein referred to as "Leasehold Mortgage", and the holder of any such Leasehold Mortgage as the "Leasehold Mortgagee"), upon the condition that all rights acquired under such Leasehold Mortgage shall be subject to each of the covenants, conditions and restrictions set forth in this Lease.

(b) Lessor agrees that subsequent to notice of the existence of a Leasehold Mortgage by Lessee or the Leasehold Mortgagee, and thereafter for so long as such Leasehold Mortgage remains unsatisfied, the following provisions shall apply:

(i) There shall be no cancellation, surrender or modification of this Lease by joint action of Lessor and Lessee without the prior written consent of the Leasehold Mortgagee.

(ii) Any notice given to Lessee by Lessor shall simultaneously be given to the Leasehold Mortgagee. If such notice pertains to a default or defaults by Lessee, any Leasehold Mortgagee shall have the right to cure the default complained of within the same period from the date of notice to the Leasehold Mortgagee as is given Lessee pursuant to the applicable provisions of this Lease, and Lessor agrees to accept the Leasehold Mortgagee's performance as fully as

though Lessee had cured the default. If a notice advises that Lessor had elected to terminate this Lease because of the default or defaults of Lessee, then, notwithstanding any provision of this Lease to the contrary, any Leasehold Mortgagee shall have at its election the right:

(aa) to nullify the notice of termination as fully as though no default had ever occurred by paying all rent and other payments then in default to Lessor, within thirty (30) days after receipt of Lessor's notice of termination; or

(bb) to indefinitely postpone the termination of this Lease by giving Lessor within thirty (30) days after receipt of Lessor's notice, notice of its intent to foreclose its Leasehold Mortgage, accompanied by its payment of all rent and other payments then in default, and thereafter, commencing and proceeding with reasonable diligence to foreclose its Leasehold Mortgage, meanwhile paying all rent and other amounts due under this Lease, which postponement shall continue until confirmation of the foreclosure sale, whereupon such notice of termination shall be deemed nullified as fully as though no default had occurred.

(iii) Lessor agrees that in the event of termination of this Lease by reason of default by Lessee, and upon notice from the Leasehold Mortgagee given within thirty (30) days after the date upon which this Lease terminates, Lessor will enter into a new lease for the Premises with the Leasehold Mortgagee, or its designee, for the remainder of the term, commencing as of the date this Lease is terminated as to Lessee,

but effective as of the date of this Lease and prior to the interest of any subsequent transferee of Lessor's interest in the Premises, at the rent and otherwise upon the same terms and conditions of title that this Lease is subject to on the date of termination and the rights of any parties then in possession of any part of the Premises. Notwithstanding the foregoing, it shall be a condition to Lessor's obligation to enter into such new lease, that the Leasehold Mortgagee, or its designee, pay to Lessor, at the time of execution of said new lease, all sums due Lessor by reason of Lessee's default in the payment of rent and other sums due hereunder, together with Lessor's costs and expenses in terminating this Lease, including attorneys' fees. Lessor covenants that Lessor shall not cancel, modify or surrender any sublease affecting all or any part of the Premises by joint action of Lessor and such sublessee prior to expiration, without exercise, of the rights given Leasehold Mortgagee pursuant to this subparagraph 21(b)(iii).

(iv) Lessor and Lessee agree that the Leasehold Mortgagee may be added as its interest may appear, to the "Loss Payable Endorsement" of any insurance policies required to be carried out by Lessee hereunder.

(v) The Leasehold Mortgagee shall be given notice of any actions or proceedings by the parties hereto, and shall have the right to intervene therein and be made a party to such proceedings at its sole cost and expense. Any Leasehold Mortgagee that elects not to intervene or become a party to such proceeding shall have

the right to receive from Lessee a copy of any award or decision made therein." (R.270-272)

REPLY

BRIEF

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner replies to arguments first raised in Respondent's Brief in Opposition ("Br. in Opp."):

1. ***Conflict Among the Circuits.*** Petitioner has demonstrated both a conflict among the circuits and a split of authority among lower courts in circuits where the courts of appeals have not spoken. (Pet. at 7-14). Nevertheless, Respondent denies that there is any conflict. Essentially, Respondent's argument is that the cases cited in the Petition are distinguishable because the *facts* in this case are different. (Br. in Opp. at 4-5). Yet, if the undisputed facts in this case were presented to a panel of the Ninth Circuit, the decision in this case would be different. This case presents a clear conflict which should be resolved by this Court.

Respondent also predictably argues that, if there is a conflict, the Court should not grant review until the issue

is "illuminate[d]" and more courts have "experimented" with solutions (Br. in Opp. at 6-7), curiously citing the stinging criticism of such an approach in the context of peremptory challenges which excluded racial minorities from juries. *Gilliard v. Mississippi*, 464 U.S. 867, 869 (1983) (Marshall, J., dissenting).

Respondent's argument makes no sense here, in any event. There is no need "to define and narrow the issue in question." (Br. in Opp. at 7). Nor is the issue posed "abstractly." (*Id.*) The question presented is narrow, and the issue has been well defined by the courts. The number of possible solutions is limited to two. Three circuits and a number of lower courts already have chosen one interpretation of the statute or the other. Awaiting additional decisions from courts of appeal will serve little purpose. There is no realistic prospect of resolving this conflict without a decision by this Court. Guidance is needed now, and this Court should grant review in order to resolve this important question of federal bankruptcy law.

2. ***The Wrong Statute.*** Respondent argues that this case is disposed of by reference to section 70(b) of the old Bankruptcy Act, as added by the Chandler Act of 1938, 52 Stat. 840, 880-881 (1938), and by one sixteen-year-old Fifth Circuit case interpreting the old statute. (Br. in Opp. at 3-4). However, the language of that statute (see Br. in Opp. at 3, n.3), which previously was codified at 11 U.S.C. § 110(b), differed from the language of 11 U.S.C. § 365(d)(4) in a number of significant respects. Most importantly, section 70(b) contained no provision even remotely similar to the language added by Congress in 1984: "the trustee shall immediately surrender such nonresidential real property to the lessor." 11 U.S.C. § 365(d)(4). (See Pet. 7-8). It is deemed rejection *plus* immediate surrender that causes the termination of the lease. *See Sea Harvest Corp. v. Riviera Land Co.*, 868 F.2d 1077 (9th Cir. 1989). Moreover, under the old statute, there was significant doubt whether section 70(b) even applied in reorganization cases where – like here – no

bankruptcy trustee had been appointed. *See* Lee Silverstein, *Rejection of Executory Contracts in Bankruptcy and Reorganization*, 31 U. Chi. L. Rev. 467, 498-499 (1964).

3. ***Failure to Cross-Petition.*** Respondent seeks to evade the narrow question presented by dredging up three issues on which the court of appeals did not rule: (1) the constitutionality of section 365(d)(4) (Br. in Opp. at ii, 1, and 8-9); (2) the alleged waiver arising from Petitioner's acceptance of rent (*id.*, at ii and 7-8); and (3) the alleged right, claimed by Respondent, to enforce a provision of the Ground Lease between Petitioner and the Developer which allegedly requires Petitioner to execute a new lease with Respondent. (*Id.*, at ii, 1, 2 and 8).[1]

However, the issues that Respondent seeks to raise in its brief are not properly before this Court. While Respondent may argue for affirmance on a ground not relied upon by the court of appeals, Respondent must cross-petition if it seeks to change or modify any part of the judgment below. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 119 n.14 (1985); *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.11 (1976) (respondent prohibited from raising constitutional issue due to failure to cross-petition).

The court of appeals' opinion allowed Respondent to try to convince a state court that the rejection of the lease between Petitioner and the Developer did not affect Respondent's lien and other claims against the Developer's leasehold interest. (Pet. App. A, 14a). The opinion made clear, however, that the Developer and its bankruptcy estate had no further interest in the lease. (*Id.*)

The arguments of unconstitutionality, waiver, or enforcement of a lease provision would generate more relief than provided by the judgment of the court of appeals, and would require significant modification of

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[1] Respondent's arguments on those issues previously had been rejected by both the bankruptcy court and the district court.

the judgment. If either of the first two arguments were to be successful, then the Ground Lease between Petitioner and the Developer has never been rejected, either because the statute is unconstitutional or because the Petitioner waived its rights. If the third argument were accepted, the judgment would have to be modified to require Petitioner to execute a new lease with Respondent. One must cross-petition in order to raise these arguments. Respondent did not.

4. ***Uncertainty and Confusion.*** Denying that the Fifth Circuit's decision creates uncertainty, Respondent misunderstands the opinion below. For example, Respondent assumes that the Developer still can "cure" the default created by 11 U.S.C. § 365(d)(4). (Br. in Opp. at 11). However, the court of appeals ruled that the Developer's bankruptcy estate had lost all rights under the lease, and sent the dispute between Petitioner and Respondent to state court. (Pet. App. A, 14a). Indeed, Respondent believes that this is appropriate because: "State law universally grants the landlord a speedy possessory remedy." (Br. in Opp. at 10).

Despite Respondent's bold representations regarding state court remedies, the court of appeals' decision poses a dilemma for all landlords. Should a landlord relet the premises and risk future litigation? Or should it – contrary to the purpose of section 365(d)(4) – allow the premises to remain vacant? (See Pet. 15-17). Under the court of appeals' opinion, rather than receiving the relief intended by Congress, a landlord is left to the uncertain devices available in the state courts, which almost assuredly will not be as "speedy" as Respondent asserts, and none of which will be as efficient as the bankruptcy process enacted by Congress.

Finally, the "wasteful litigation" that Respondent decries (Br. in Opp. at 10) is caused by confusion over rejection that has resulted from the two differing interpretations of 11 U.S.C. § 365(d)(4). This Court can end

that wasteful litigation and confusion by granting certiorari to resolve this conflict and by providing guidance on this important issue of federal bankruptcy law.

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